

October 7, 2003

PUBLIC UTILITIES COMMISSION  
Underground Facility Damage Prevention  
Requirements (Chapter 895)

NOTICE OF RULEMAKING

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

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**I. SUMMARY**

In this rulemaking, we propose to amend Chapter 895, the Underground Facility Damage Prevention Requirements Rule, to accomplish two objectives:

- 1) to conform to changes to the law protecting underground facilities made by P.L. 2001, ch. 577 and P.L. 2003, ch. 373; and
- 2) to improve and clarify the existing rule based on experience to date and discussions with both excavators and operators.

The changes to be adopted herein are adopted under the Commission's general rulemaking authority and are not designated for legislative review.<sup>1</sup>

**II. BACKGROUND**

The law protecting underground facilities requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public when excavation occurs near an underground facility. 23 M.R.S.A. § 3360-A. The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. These procedures, along with those governing the Commission's enforcement activities, are contained in Chapter 895 of our Rules, entitled "Underground Facilities Damage Prevention Requirements."

During the second session of the 120<sup>th</sup> Legislature, Maine's Legislature approved revisions to 23 M.R.S.A. § 3360-A.<sup>2</sup> The law was enacted as emergency legislation and

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<sup>1</sup> Changes related to P.L. 2003 ch. 373, regarding provisions for well constructors are under consideration in another pending rulemaking, Docket No. 2003-671. The attached draft rule contains notations identifying two locations where proposed amendments from Docket No. 2003-671 would appear in the final version of Chapter 895. However, parties may review and comment on the actual proposed amendments in that docket.

therefore took effect when approved by the Governor on March 28, 2002.<sup>3</sup> We will refer to this law as the 2001 Act.

### **III. DISCUSSION OF AMENDMENTS**

#### **A. Editorial Changes**

As a housekeeping matter, we propose to amend some references to the Maine Revised Statutes Annotated so that they are consistent throughout the chapter.

We also propose to amend some cross-references to other sections and subsections within the Chapter so that they are consistent throughout. Any of the twelve main headings of the Chapter or a capital letter division of those headings is referred to as a "Section". Any division below that of a capital letter is referred to as a "Subsection."

Finally, we propose to change reference in our rule to The Dig Safe System, Inc. from "Dig Safe" to "the Dig Safe System" in accordance with the practice and preference of that entity. The Dig Safe System, Inc., an independently owned corporation that operates the New England regional damage prevention system, currently carries out the underground safety system directed by law.

#### **B. Other Proposed Changes**

##### **Section 1: General Provisions**

We propose to modify Section 1(B) "Applicability" to reflect the elimination of architects and other designers of excavations established by P.L. 2001, ch. 577, section 4.

##### **Section 2: Definitions**

###### **a. Per 2001 Act**

We propose the following additions and modifications of Section 2 in accordance with the 2001 Act:

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<sup>2</sup>An Act to Improve the Safety Provided by the Underground Facilities Protection Law, P.L. 2001, ch. 577.

<sup>3</sup>The Commission issued a Notice of Rulemaking on June 25, 2002 in Docket No. 2002-359 to incorporate the legislative changes but the rulemaking was not completed within the statutory timeframe. This new rulemaking will accomplish the incorporation of the March 28, 2002 statutory changes into Chapter 895.

i. The definition of “excavation” appearing in Section 2(K) of the rule currently excludes the installation and maintenance of signs performed by the Department of Transportation. We propose to strike this exclusion. P.L. 2001, ch. 577, section 1.

ii. We propose to insert, as Section 2(S-2), the legislatively adopted definition for “shoulder-grading activity” as the use of equipment with a blade to remove material along a roadway shoulder for drainage purposes. P.L. 2001, ch. 577, section 2. We expect to interpret this as an exemption applying only to excavation using horizontal scraping devices (i.e. blades) and not actual digging with a mechanical scoop or bucket. We invite comments regarding this interpretation.

iii. We propose to modify the definition of “underground facility operator,” Section 2(U), to exclude an owner of underground facilities on its own property for commercial or residential purposes. P.L. 2001, ch. 577, section 3.

b. Other clarifying changes

We propose the following additional modifications to the definitions to clarify the existing rule:

i. We propose to add a definition of “damage prevention incident” as Section 2(E-1). The definition is crafted to clarify when possible or suspected violations of the Dig Safe law or this rule should be reported to the Commission. This term will replace the word “incident,” which appears in the reporting requirements sections of the rule (Subsections 4(D)(2) and 6(C)(1)) and is used extensively in our enforcement forms and proceedings to mitigate possible confusion with the use of the term “incident” in other state and federal contexts.<sup>4</sup>

ii. We propose to modify the definitions of “emergency” and “emergency excavation,” Sections 2(I) and (J), to provide that in emergency situations excavation may take place within 12 hours, rather than immediately. We do so at the suggestion of operators, such as electric utilities, who frequently must repair utility poles damaged in nighttime accidents but prefer to do so in daytime hours when possible. The revised definition of “emergency excavation” allows excavation that is necessary to prevent injury, death or loss of an existing vital service (e.g. an emergency) to take place within 12 hours, rather than immediately, in appropriate situations. This would allow operators to stabilize potentially hazardous situations that occur during nighttime accidents when called to the scene at night, but delay completion of the work, such as changing out weakened utility poles, until the next morning during daylight hours.

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<sup>4</sup> Our utility accident reporting rule, Chapter 130, uses the term “serious accident” in designating when a utility must report to the Commission. Federal law refers to “incident” for gas utilities in an operational and maintenance regulatory context. “Damage prevention incident” should be sufficiently distinct to avoid confusion.

iii. We propose to add a definition of a “serious damage incident” as Section 2(S-1) in conjunction with our proposal to add a requirement to Subsection 6(C)(1) that operators provide immediate notice to the Commission in certain circumstances. We wish to receive notification of damage prevention incidents that are especially hazardous or disruptive to allow us to respond appropriately. Immediate notification will ensure that the Commission will be aware of serious events relating to excavation around underground facilities when they occur to enable us to respond to inquiries, and would also allow it to send an investigator to the site should it be warranted.

### Section 3: Responsibilities of the Designer

We propose to repeal this section in accordance with the Act. P.L. 2001, ch. 577, section 4.

### Section 4: Responsibilities of the Excavator

We propose to modify Section 4(A), "Pre-marking," to require the excavator to include its initials in its pre-mark and, in instances where the excavator uses a single stake or other single point indicator, to indicate the radius of the excavation area. These procedures will help operators identify the correct work site when marking. By placing its initials on the pre-mark, the excavator will provide operators with information that helps to confirm that the designated excavation area matches that indicated on the Dig Safe ticket. While not required, excavators could also consider indicating their phone number or Dig Safe ticket number with their initials to provide even more confirming or contact information to assist operators.

We propose to modify Subsection 4(B)(1)(a) in two ways. The first is to clarify that there are two exceptions to the notice process delineated in this subsection, emergency notifications pursuant to Section 4(C) and waiver of the waiting period when no facilities exist in the excavation area as established in P.L. 2003, ch. 373, codified at 23 M.R.S.A. 3360-A, subsections 3 (A) and (G). The second is to require excavators to specify when they notify operators with underground facilities within the area of an emergency excavation that they are making an emergency notification. We propose this to help ensure that emergency excavation notifications are not misunderstood as normal excavation notifications.

We have inserted a placeholder for Subsection 4(B)(1)(a)(i) for the language of the 2003 Act waiving the 3-day waiting period in circumstances when excavators have made all required notifications and are informed that no underground facilities exist in the proposed excavation area. P.L. 2003, ch. 373, codified at 23 M.R.S.A. 3360-A, subsections 3 (A) and (G). This provision is under consideration in Docket No. 2003-671. Comments on this provision should be made in that proceeding.

We propose to insert Subsection 4(B)(3) using the language contained in the 2001 Act, which makes explicit the duty of the excavator directly responsible for

performing the excavation to ascertain that all required notifications have been made. P.L. 2001, ch. 577, section 5.

Because operators report that abuses of the emergency excavation notification procedures occur with some regularity by excavators who do not wish to wait for the normal marking period to expire, we considered modifying Subsection 4(C)(1) to make clear that misuse of the emergency excavation provision in situations that are not emergencies as defined in this rule will be punishable under Subsection 4(B)(1)(a). Such misuse unfairly burdens operators who must make an extra effort to accommodate emergency excavations and still meet the deadline under the law for marking all properly noticed excavation areas. We conclude that it is not necessary to make misuse of the emergency notification provision a separate violation of the rule, since the rule already reaches this conduct. Misuse of the emergency excavation notification exemption in the law constitutes a failure to properly notify operators under Subsection 4(B)(1)(a) and is therefore a punishable violation under the Damage Prevention law, 23 M.R.S.A. §3360-A (6-C)(A).

We propose to modify Section 4(D)(2) "Report to Commission" to clarify the instances when excavators must file Underground Facility Damage Prevention Incident Reports with the Commission. Excavators and operators have expressed confusion with the previous language of this section, which required an excavator to both directly observe a suspected violation of the rule and make a judgment that the suspected violation poses a clear threat to an underground facility or results in damage to the facility. We propose to omit the qualifying and judgmental aspects of the requirement that tend to distract from the core issue of whether a suspected violation has occurred. The amended provision is more consistent with uniform enforcement of the damage prevention law. We also make updates to the Commission website address and clarifying or editorial changes to this provision, such as using the revised term "Damage Prevention incident" as proposed in this rulemaking.

We propose to amend Section 4(F) by including an exemption to the excavator notification requirements for cemetery activities and an exemption from the safety zone requirements for shoulder-grading provided that the excavators performing such activities follow certain procedures. P.L. 2001, ch. 577, section 8. We have deviated from the language of the 2001 Act in the first sentence of Subsection 4(F)(3) by putting "is" in the place of "may be" because we believe it is more consistent with the logic and intent of the provision.

#### Section 6: Responsibilities of the Operator

We insert a placeholder as Subsection 6(A)(1)(d) for a provision proposed in Docket No. 2003-671 that specifies the means by which each member operator shall identify and report the location of its underground facilities to the Dig Safe System. Comments on this provision or its placement should be directed to Docket No. 2003-671.

We propose to amend Subsection 6(B)(1) to make operators of underground facilities responsible for marking, in addition to their own facilities, all underground facilities used for furnishing gas and electric service that are connected to the operator's facilities located in a public way and known to the operator. P.L. 2001, ch. 577, section 6. We also specify that operators shall mark any abandoned or inactive facilities as required by new Section 6(F), discussed further below, and that if the operator determines that there are no facilities in the excavation area that it is obligated to mark, it shall inform the excavator in writing prior to the expiration of the excavator's waiting period. We further propose to indicate that the written notice may take the form of electronic facsimile, e-mail, or marks made at the excavation site.

We propose to amend Subsection 6(B)(4)(a) to require operators to mark the location of underground facilities at least 10 feet beyond the boundaries of the proposed excavation area and to mark facility locations at intervals of no more than 25 feet. We propose this to provide additional protection to underground facilities proximate to the excavation area in the event that excavation activities remove the facility location markings. The additional marking will also help ensure that excavators are aware of facility locations even when excavation approaches the outer boundaries of the pre-marked area or obscures markings. Marking at intervals of no more than 25 feet will help ensure that visual continuity is maintained, avoiding confusion about the location of the facilities. Some operators have indicated that they routinely take measure such as these, essentially as best practices.

We proposed to insert two provisions in Subsection 6(B)(4)(b), "Tolerance zone," that exist in the law but appear to have been inadvertently omitted from the original rule. The first requires the operator to indicate the depth of the underground facility, if known, when marking. 23 M.R.S.A. § 3360-A (4). We have heard from operators that it can be difficult to know the depth of their facilities, particularly with the passage of time as earth movements and erosion take a toll. However, the law requires operators to provide this information to excavators when possible, evidently intending that operators should communicate complete knowledge of the location of their facilities to excavators. The second insertion we propose is to establish that non-member operators are allowed a tolerance zone of 36, rather than 18, inches from the exterior sides of the facilities. 23 M.R.S.A. §3360-A (10)(B). In most other respects, the damage prevention notice and marking procedures for members and non-members are identical. We propose these changes to ensure that our rule accurately reflects the law.

We propose to amend Subsection 6(C)(1) "Report to Commission" in the same manner as Subsection 4(D)(2) governing excavator reporting. We further add a companion provision to the definition of "serious damage prevention incident" at Section 2(S-1) that specifies that operators shall provide immediate notice to the Commission of such incidents in a manner consistent with the most recent notification procedures provided by the Commission, which are distributed on a periodic basis.

We propose to amend Subsection 6(C)(2) to exempt operators with less than 25 miles of underground facilities from the requirement to submit an annual activity

report to the Commission. We propose this in order to relieve small operators, the ones that are most likely to be burdened by such regulatory requirements, from this duty. We invite comment on whether 25 miles of underground facilities is an appropriate threshold for this reporting requirement.

We propose to add a Section 6(F) to require operators of underground facilities to notify excavators of abandoned and inactive underground facilities in the area of an excavation of which the operator is aware and to indicate the existence of such facilities in its electronic mapping system if the operator is required to maintain such a system. P.L. 2001, ch. 577, section 7.

#### Section 7: Commission Activities

We propose to amend Subsection 7(B)(2)(a) and (b) to provide flexibility to the assigned staff investigator to waive the informal conference in situations where the respondent does not request, and the investigator does not feel the need for, an informal conference. The amendment also provides for the informal review to consist of an informal review, analysis of the respondent's written reply to an NOPV, or both. The current language can be read to rigidly require both even if the respondent does not wish to proceed in that manner.

We propose to amend Subsection 7(B)(2)(d)(3) to allow the Commission to require persons with relevant information about a damage prevention incident to attend the informal conference and/or to provide documentation or other evidence for use in the investigation. This is necessary because persons with first-hand knowledge of the incident, such as persons who were present at the job site around the time of the incident, are frequently necessary to evaluate whether a suspected violation has occurred. While their actions are not the focus of the investigation, their observations are often valuable in determining what occurred.

We propose to amend Subsection 7(B)(4)(a) to require that a respondent requesting an adjudicatory hearing must indicate the findings or conclusions with which the respondent disagrees and provide the respondent's position thereon. This information will increase the efficiency of the adjudication by providing a focus for the hearing, allowing parties to better address the respondent's concerns.

#### Section 8: Administrative Penalties

We propose to satisfy the legislative intent of P.L. 2001, ch. 577, section 11, by indicating in the order adopting the final amendments to Chapter 895 that the Commission may impose an administrative penalty for the failure of an excavator to follow the exemption procedures provided in 23 M.R.S.A. §3360-A sections 5-C, 5-D and 5-E. Any excavator that fails to comply with the exemption requirements in the law will be held to the standard excavator requirements. We propose not to add the explicit statutory language appearing at P.L. 2001, ch. 577, section 11 to the rule's list of violations for which the commission may impose an administrative penalty appearing in Section 8(C) and to rely instead on finding a violation of the normal notice provisions in

cases where the provisions for an exemption are not met.<sup>5</sup> We invite comment on this proposal. We also invite comment on whether, as a policy or enforcement matter, there is merit to attaching the penalty to the specific requirements of the exemptions themselves, rather than to the underlying provisions of the law for which the excavator would otherwise be held accountable in the event he failed to satisfy the requirements for an exemption.

We propose to modify the headings in Section 8(E) because they may create confusion and appear to be inconsistent with the statute. The Legislature imposed a maximum penalty of \$500 for any violation of the damage prevention law, except that if the person has been found in violation within the prior 12 months the administrative penalty may not exceed \$5,000 for a violation. The headings, "single violation" and "multiple violations," were intended to summarize the sequential application of the maximum penalty levels. However, our experience has shown that multiple violations of the law often occur within any given incident, whether it is the alleged violator's initial incident or a subsequent incident. We propose to replace the current headings with "First incident" and "Subsequent incidents" to clarify the maximum penalty level for violations that occur during initial or subsequent incidents, with an initial incident having a maximum penalty of \$500 per violation and violations that occur in subsequent incidents within 12 months of a finding of prior violations having a maximum penalty of \$5,000 per violation, consistent with 23 M.R.S.A. § 3360-A (6-C).

#### IV. PROCEDURES FOR THIS RULEMAKING

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. A public hearing on this matter is scheduled for **November 6, 2003** at the Public Utilities Commission, 242 State Street, Augusta, Maine. Written comments on the proposed amended rule may be filed with the Administrative Director, Public Utilities Commission, 18 State House Station, Augusta, Maine 04333-0018 (telephone: (207)287-3831) no later than **December 3, 2003**. Please refer to the docket number of this proceeding, Docket No. 2003-672, when submitting comments.

In accordance with 5 M.R.S.A. § 8057-A (1), the fiscal impact of the proposed rule is expected to be minimal. The Commission invites all interested persons to comment on the fiscal impact of this rule as well as the significance of this issue to this rulemaking given that it, in substantial part, simply brings our rule into compliance with recent legislative amendments to the damage prevention law.

The Administrative Director shall send copies of this Order and the attached Rule to:

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<sup>5</sup> Were we to include it in the listed violations, we would propose to insert it as Subsection 8(C)(5).



1. All utilities operating in Maine, including natural gas pipeline utilities;
2. Sewer and cable TV operators to the greatest extent practicable;
3. Excavators operating in Maine, to the greatest extent practicable;
4. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and
5. Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0015 (20 copies).

Accordingly, it is

**O R D E R E D**

1. That the Administrative Director send copies of this Notice of Rulemaking and attached proposed Rule to all persons listed above.

Dated at Augusta, Maine, this 7th day of October, 2003.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Diamond  
   Reishus